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No. 88-2031

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a Postal Service regulation that prohibits soliciting the public from an off-street walkway located on postal premises violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 866 F.2d 699. The memorandum and order of the district court (Pet. App. 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989. A petition for rehearing was denied on April 14, 1989 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on June 13, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

39 C.F.R. 232.1 (1988) provides, in pertinent part:

> (a) *Applicability.* This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property.
>
> * * * * *
>
> (h) *Soliciting, electioneering, collecting debts, vending, and advertising.*
>
> (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:
>
> (i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;
>
> (ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;
>
> (iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.
>
> * * * * *

> (p) *Penalties and other law.* (1) Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules. * * *
>
> (2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both. * * *
>
> (q) *Enforcement.* (1) Members of the U.S. Postal Service security force shall exercise the powers of special policemen provided by 40 U.S.C. 318 and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property.
>
> (2) Local postmasters and installation heads may, pursuant to 40 U.S.C. 318b and with the approval of the chief postal inspector or his designee, enter into agreements with State and local enforcement agencies to insure that these rules and regulations are enforced in a manner that will protect Postal Service property.

STATEMENT

1. In 1970, Congress enacted the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 720, 39 U.S.C. 201 *et seq.*, to "improve and modernize" the Nation's postal system. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). Although acknowledging that the national mail delivery system "is a public service" (*id.* at 11), Congress stated that "there is no reason why it cannot be conducted in a businesslike way and every reason why it should be." *Id.* at 11-12. Congress hoped that the new Postal Service would

provide "efficient and economical" service, would respond to "the needs and desires of * * * the American public," and would eventually be self-supporting. *Id.* at 5, 17, 19.

In 1977, in an attempt to decrease "unnecessary, nonmission related administrative burdens on the Postal Service" (42 Fed. Reg. 63,911), the Postal Service proposed to revise regulations governing public activities unrelated to postal business at postal stations nationwide. As adopted in 1978, see 43 Fed. Reg. 38,824, the regulations eliminated exceptions to the preexisting general prohibition on vending and soliciting on postal premises [1] by deleting provisions that had permitted the limited use of Postal Service property for fundraising by national nonprofit, charitable, or philanthropic organizations.[2] In an effort to clear space for post office business, the regulations also barred the deposit or display of written materials, except on authorized boards. See 39 C.F.R. 232.1 (o). The regulations did not, however, prohibit noncommercial leafletting, pamphleteering, picketing, or discussion of public affairs on postal premises. See 43 Fed. Reg. 38,824 (1978).

2. Respondents are members of the National Democatic Policy Committee, a political advocacy group. On August 6, 1986, they set up a card table near the entrance to a post office in Bowie, Maryland, located on a major suburban thoroughfare. See J.A. 16-17. The table was located approximately five or six feet

[1] The general prohibition on soliciting and vending was codified at 39 C.F.R. 243.3(a)(5) (1972), and subsequently revised and recodified at 39 C.F.R. 232.6(h)(1) (1973) and 39 C.F.R. 232.1(h) (1988). See note 10, *infra*.

[2] The deleted provisions were codified at 39 C.F.R. 243.3(a)(1)-(3) (1972); 39 C.F.R. 232.6(h)(2) (1973); 39 C.F.R. 232.6(h)(2) (1974). See note 10, *infra*.

from one of two entrances to the post office. J.A. 33, 39. The table stood on, and partially blocked, a seven-foot wide concrete walkway that runs along the entire length of the post office and separates the building from the surrounding parking lot. See Pet. App. 12a; J.A. 34-35, 61. The walkway, which provided the sole route from the parking lot to the building entrance (see Pet. App. 2a), was entirely on Postal Service property, and was at all points more than 75 feet from the street and the public sidewalk abutting the street. See Pet. App. 15a; J.A. 94-96.[3]

For several hours, respondents attempted to "get[] the * * * attention" of postal patrons as they passed between the parking lot and the post office building. Respondents called out questions about the problem of illegal drug use and drew patrons' attention to publications they were offering for sale. J.A. 37. They requested contributions for their organization, sold subscriptions to the organization's newspaper, and distributed literature and pamphlets. Pet. App. 2a-3a, 12a, 15a. During the several hours that respondents were soliciting, postal employees received

[3] The district court described the Bowie post office as follows (Pet. App. 24a):

> [T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

between 40 and 50 complaints about respondents' activities. *Id.* at 3a, 13a, 15a. Eventually, the Bowie postmaster approached respondents and requested that they leave. When they refused, Postal Inspectors were called to the scene. After observing respondents' activities, the Postal Inspectors supplied respondents with a copy of the pertinent postal regulations and asked them to remove their table and leave the premises. *Id.* at 26a. When respondents again refused, they were arrested. *Id.* at 3a, 13a.

3. Following a trial before a United States Magistrate in the District of Maryland, respondents were convicted of soliciting contributions on postal premises, in violation of 39 C.F.R. 232.1(h); refusing to comply with directions to leave postal property, in violation of 39 C.F.R. 232.1(d); and trespassing on postal property, in violation of 18 U.S.C. 13, incorporating Maryland state law. Respondent Kokinda was fined $50 and sentenced to ten days' imprisonment. Respondent Pearl was fined $100 and received a suspended sentence of 30 days' imprisonment. Pet. App. 3a.

4. Respondents appealed to the district court, arguing, among other things, that postal service regulation 39 C.F.R. 232.1(h) violated the First Amendment in prohibiting solicitation on the post office access walkway. The district court affirmed. Pet. App. 23a-30a. With respect to respondents' constitutional challenge, the court held that the Bowie post office walkway was not a public forum, and that the prohibition against soliciting in that location was a valid restriction under the First Amendment. *Id.* at 27a-28a.

5. A divided panel of the court of appeals reversed, holding that the regulation violated respondents' First Amendment rights. Pet. App. 1a-22a.

Declaring that "[s]idewalks * * * are presumptively public forums," the majority reviewed the vital role of the "peaceful expression of protest on the streets and sidewalks of this country" in bringing "issues of social import to public attention." *Id.* at 4a. The majority observed that respondents' attempts to sell subscriptions to their organization's newspaper and to solicit contributions were forms of "classic political speech" entitled to core First Amendment protection. *Id.* at 5a.

The majority concluded that the walkway in front of the Bowie post office was a "public forum." *Id.* at 6a. Citing *Boos* v. *Barry*, 108 S. Ct. 1157, 1161 (1988), *United States* v. *Grace*, 461 U.S. 171, 179 (1983), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the majority compared the off-street walkway surrounding the Bowie post office to sidewalks "surrounding foreign embassies * * * [or] the Supreme Court * * * or state capitol grounds." These areas, the majority observed, "serve the primary function of safely accommodating pedestrian traffic," but may also "accommodate other uses simultaneously, including use as a forum for a peaceful expression of political views." Pet. App. 6a. The majority acknowledged that solicitation "conducted on busy pedestrian walkways such as this one, may cause some inconvenience to the flow of traffic," but concluded that "congestion and inconvenience are not the end of the matter" because "[t]he First Amendment requires that society tolerate some inconvenience in public forums to protect the values of free expression." *Id.* at 6a-7a. The majority observed that it is precisely the volume of traffic that makes sidewalks "a particularly public and therefore appealing forum for public discourse." It pointed out that, for this reason, "the municipal sidewalk [that] runs

along the street on which the Bowie post office is located" would hardly be "a viable alternative forum." *Id.* at 7a.

Acknowledging that other courts of appeals had held similar post office walkways to be nonpublic forums,[4] the majority nonetheless criticized those decisions for ignoring "the fact that most sidewalks are designed as outdoor public thoroughfares," and for drawing overly fine distinctions that would leave citizens "to wonder at which [walkways] they will be permitted to speak and which ones not." Pet. App. 6a. Concluding that to do otherwise would "consign [the First Amendment] to the mercies of architectural chicanery" (*id.* at 8a), the majority declined to permit the walkway's character as a public forum to turn on "the expedient of placing a parking lot between it and the public street." *Id.* at 7a. That the post office walkway was located on Postal Service property, was set back at some distance from the street, and was dedicated to post office use were not sufficient, the majority held, to deprive the walkway of the character of a public forum. *Ibid.*[5]

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[4] See *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986) (upholding Postal Service no-solicitation rule as applied to solicitation on off-street access walkway located entirely on postal service property); *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986) (same); *Monterey County Democratic Central Committee* v. *United States Postal Service*, 812 F.2d 1194 (9th Cir. 1987) (finding access walkway not a traditional public forum in rejecting a challenge by a Democratic Party Committee to a Postal Service guideline).

[5] The majority also decided that the post office walkway could not be compared to the specialized government properties found not to be public forums in *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) and *Adderley* v. *Florida*, 385 U.S. 39, 41 (1966), because "[a]bsent from the post office sidewalk is the special need for security and discipline associated with the confines of a military reservation * * * [or] the curtilage of a jail." Pet. App. 7a.

Given its view that the walkway was a public forum, the majority concluded that respondents' activities could not be excluded except by content-neutral time, place, or manner regulations that furthered a "significant government interest" and were "narrowly tailored" to "leave open alternative channels of communication." Pet. App. 8a. Because the no-solicitation regulation prohibited "an entire category of expression" (*id.* at 9a), the majority concluded that it was "neither a reasonable manner restriction nor * * * narrowly drawn to accomplish a significant government interest" (*id.* at 8a-9a). The majority did not find significant the absence of limitations on other forms of expression, such as leafletting and picketing, stating that "[t]he critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not." *Id.* at 10a.

The majority found no evidence that the ban on solicitation served important purposes. In the court's view, the record indicated "at most, minor inconvenience to postal patrons." Pet. App. 12a. The majority suggested that disruption could be minimized by other means with a less restrictive impact on speech, including direct prohibitions on "obstruction, disruption, or harassment." *Ibid.* The majority also denied that the government had a valid interest in minimizing the disruption caused by "forty or fifty" customer complaints received by postal employees in response to respondents' activities over several hours.[6]

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[6] Citing *Feiner* v. *New York*, 340 U.S. 315 (1951), the majority noted that "the complaints may have been generated

Judge Widener dissented. Pet. App. 15a-22a. He disagreed with the majority's conclusion that the post office walkway should be classified as a "public forum." He rejected the "premise advanced by the majority * * * that all sidewalks, wherever located, are fungible and are public forums." *Id.* at 18a. Judge Widener explained that "[i]dentifying a portion of government property as a sidewalk does not end the inquiry. Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic." *Id.* at 18a-19a. In his view, the access walkway under consideration could not be compared to "the municipal sidewalk which forms the street front boundary of this postal property," nor to the municipal sidewalk "forming part of the perimeter" of the Supreme Court, which the Court in *United States* v. *Grace*, 461 U.S. 171 (1983), found to be " 'indistinguishable from any other sidewalks in Washington, D.C.' " Pet. App. 18a (quoting *Grace*, 461 U.S. at 179). Unlike the sidewalk in *Grace*, the postal walkway did not "define the government property or form the perimeters thereof," but was located some distance from the municipal sidewalk running along the street and "serve[d] only one function, i.e., for access to the post office in furtherance of postal business." Pet. App. 19a.

Judge Widener also concluded that the government had not converted the post office grounds into a forum for the public exercise of First Amendment

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by the hearers' disagreement with the message of the National Democratic Policy Committee," and concluded that limitations on respondents' rights of expression could not be imposed to "protect[] * * * the sensibilities of those who would object to the speech." Pet. App. 13a.

rights by permitting expressive activity other than solicitation. He explained that " 'the government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " (Pet. App. 20a (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985)). Because solicitation is more "intrusive" and "causes greater disruption and confusion" than the simple distribution of literature, Judge Widener concluded that the no-solicitation rule was reasonable "in light of the purpose the property is intended to serve." Pet. App. 20a.

A petition for rehearing was denied, with Judge Widener voting for rehearing, and a suggestion for rehearing en banc was denied by a vote of 6-5. Pet. App. 31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. 1. In 1978, the Postal Service implemented a rule banning solicitation and vending on postal premises. Several courts of appeals have upheld the regulation as consistent with the First Amendment (see Pet. 13-16), but a divided Fourth Circuit has now struck it down. That court ruled that the Postal Service cannot forbid soliciting on an off-street walkway that functions solely to provide access to a post office, and lies entirely on postal premises. In so doing, the court ignored the well-established principle that government property acquired for a narrowly defined purpose and dedicated to a specific function can be reserved by the government for its intended use.

Congress created the Postal Service for one purpose only: to deliver the mail. See 39 U.S.C. 101(a).

(1982). To accomplish its assigned task, the Postal Service operates a system of more than 35,000 postal facilities nationwide. These facilities are likewise designed with one goal in mind: the efficient and expeditious delivery of over 100 billion letters, postcards, packages, and circulars each year. See 20 Market Dep't, Market Research Div. Office of Market Research & Systems Management, U.S. Postal Service, *Competitors and Competition of the U.S. Postal Service*, 5, 31, 35 (Oct. 1988) [hereinafter *Competitors and Competition*]. The primary function of property acquired by the Postal Service for its postal stations—including access walkways that funnel patrons to and from post office buildings—is fundamentally incompatible with the status of that property as a forum generally available to the public for speech, assembly, and debate.

2. This Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800; see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Under this analysis, the access walkway between the Bowie post office parking lot and building is not a public forum. Unlike "open spaces, * * * [a] meeting hall, park[s], street corners[s], or other public thoroughfare[s]" (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303 (1974)), there is no established history of regular use of postal premises as places of assembly, debate, and public expression. To the contrary, this property has always been reserved for the provision of postal services. The postal access walkway at issue here, in contrast to general municipal

sidewalks, serves exclusively to carry postal patrons to and from the post office for the conduct of postal business.

The fact that the post office access walkway lies out of doors and contains sections of pavement resembling an ordinary municipal sidewalk does not transform it into a public forum. In *Greer* v. *Spock*, *supra*, and *Adderley* v. *Florida*, *supra*, areas with physical features in common with traditional public forums were found *not* to be open to the public for First Amendment activities, because the government had reserved them for a specialized use. It is the *use* to which government property is put or for which it is designated, not its physical characteristics, that determines whether it is a public forum. Otherwise, every strip of pavement located on public property would qualify as a public forum, and every patch of grass would qualify as a public park.

The Bowie post office walkway is not a public forum simply because it is generally open to the public, or because the large volume of traffic entering the post office makes the access walkway attractive to those who wish to solicit the public. "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Grace*, 461 U.S. at 177. In addition, even if "use of that forum may be the most efficient means of delivering the speaker's message," *Cornelius*, 473 U.S. at 809, the government is under no obligation to make available to speakers an audience assembled in a nonpublic forum for other purposes.

3. Nor has the Postal Service "designated" offstreet walkways providing access to its postal facilities as public forums by its previous practice of per-

mitting certain groups to use postal facilities for fundraising or by failing to prohibit certain other forms of expressive activity. Before banning solicitation altogether in 1978, the Postal Service permitted only occasional soliciting by designated organizations, and conferred broad authority on postal officials to refuse permission to conduct these activities if the normal business of the post office would be disrupted. The fact that the Postal Service, prior to 1978, permitted only "limited discourse" belies an intention to "open[] [this] nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. And, in any event, the decision to forbid soliciting on the premises for the past 11 years is inconsistent with the intent to maintain a public forum.

B. Because it is reasonable and viewpoint-neutral, the ban on solicitation on postal premises is a legitimate restriction on speech in a nonpublic forum. It advances the government's interest in reducing congestion and maintaining the flow of traffic on access walkways leading to its facilities and in protecting postal patrons from unnecessary distractions or impediments to the conduct of their business. At the same time, the no-solicitation rule does not pick and choose among speakers on the basis of point of view. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811.

In addition, in order effectively to compete with private-sector businesses providing similar services and achieve the Congressionally mandated goal of financial self-sufficiency, the Postal Service has an interest in creating an attractive, pleasant, and aesthetically pleasing setting for the conduct of postal

business. Like the private delivery services with which it competes, the Postal Service should be able to shield its customers from interference and annoyance, and provide a quiet, businesslike setting in which partons can purchase services undisturbed by unwelcome, unrelated importunings and blandishments.

The decision to forbid solicitation while allowing other forms of expression, such as leafletting and picketing, is fully justified by the differences between soliciting and other forms of First Amendment activity. Soliciting is an inherently more aggressive and intrusive form of conduct that can evoke annoyance and negative reactions from customers intent on other business. In addition, solicitation can require a prolonged interaction between the solicitor and his customers, which can cause delay and inefficiency in the provision of services. Moreover, the existence of other means of expression in the same and nearby locations enhances the reasonableness of the decision to prohibit this particular manner of expression, since speakers have ready access to alternative channels of communication to accomplish their purposes.

The categorical ban on solicitation is also a valid means of minimizing administrative burdens on the Postal Service. The pre-1978 system proved unworkable because it required local postmasters to field a large volume of competing demands for access to postal premises for fundraising activities. The degree of discretion necessarily granted to managers of far-flung, diverse facilities made it difficult to ensure nondiscriminatory application of the regulations; moreover, a shortage of postal personnel made effective enforcement of compliance with the permit system impossible. All these problems distracted postal employees from their primary responsibility of seeing to the prompt delivery of the mails.

C. Even if the Bowie post office walkway were a public forum—which it is not—the no-solicitation rule would still withstand constitutional scrutiny as a valid "time, place, or manner" restriction. The regulation serves a significant governmental interest, sweeps no more broadly than necessary to accomplish its articulated purposes, and leaves open alternative channels for expressive activity. The regulation singles out a narrowly defined form of expression—solicitation—and prohibits that type of activity in a well-defined location. Although it imposes a categorical ban on one manner of expression, the regulation is nevertheless valid because it singles out only the most disruptive form of expressive activity. In addition, the regulatory scheme permits speakers to accomplish their intended purpose by conducting the same activity on the nearby municipal sidewalk, or to achieve virtually the same result through the distribution of informational literature that explains the purpose of the solicitation and instructs the recipient where to send contributions.

ARGUMENT

THE POSTAL SERVICE REGULATION PROHIBITING SOLICITATION FROM THE OFF-STREET WALKWAY ON THE PREMISES OF THE BOWIE POST OFFICE DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Off-Street Walkway on the Premises of the Bowie Post Office is not a Public Forum

1. This Court has repeatedly held that the government may impose restrictions on citizens' use of public property for activities otherwise protected under the First Amendment. More than twenty years ago, in upholding the trespass convictions of individuals

conducting a demonstration on jailhouse grounds, this Court declared that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. at 47. Since then, in permitting a categorical ban on the posting of signs on municipal telephone poles and the deposit of unstamped material in household letter boxes, the Court has reiterated that " 'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.' " *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (quoting *U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). Most recently, in permitting the government to restrict participation in a federal fundraising drive, the Court emphasized that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

At the same time, the Court has recognized that certain public spaces play an important role in the constitutionally protected expression of ideas. Fifty years ago, Justice Roberts wrote that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Since then, the Court has often acknowledged that the availability of public

spaces for advocacy and expression is an important part of the political life of a vigorous democracy.

Like streets and parks, municipal sidewalks are also sites that by tradition and custom have been held open and used for the expressive conduct of citizens. "[Public] sidewalks * * * are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 315 (1968). Thus, the Court has repeatedly affirmed that sidewalks that serve as pedestrian thoroughfares are an appropriate site for the public expression of ideas; accordingly, such sidewalks cannot be placed off limits for the exercise of First Amendment rights. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536 (1964) (demonstration and march by black students along public sidewalks leading to and across the street from courthouse); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969) (civil rights march on city sidewalks); *Police Dep't* v. *Mosley*, 408 U.S. 92 (1972) (civil rights picketing on sidewalk adjacent to a school); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) (civil rights march on sidewalk adjacent to school); *Carey* v. *Brown*, 447 U.S. 455, 460 (1980) (peaceful picketing on public residential streets and sidewalks); *United States* v. *Grace*, *supra* (municipal sidewalk surrounding Supreme Court); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2499-2500 (1988) (public residential streets and sidewalks).

2. In this case, the court of appeals perceived a conflict between the traditional rights of citizens to use public spaces for expressive purposes and the government's right to reserve its property for a specific use. But in seeking to harmonize these well-recognized interests, the court incorrectly classified the property at issue in this case. In characterizing as public forums walkways located entirely within postal premises and designed solely to provide access to postal buildings, the court misapplied the principles that govern whether property qualifies as a "traditional" or "quintessential" public forum.

a. To ascertain "what limits, if any may be placed on protected speech" on property owned or controlled by the government, the Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby* v. *Schultz*, 108 S. Ct. at 2499. Thus, the character of the public property, and the use to which it is dedicated, determines the government's ability to restrict First Amendment activity in that location. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Frisby* v. *Schultz*, 108 S. Ct. at 2499 (quoting *Perry*, 460 U.S. at 44) ("the standard by which limitations on speech must be evaluated 'differ depending on the character of the property at issue' ").

The Court in *Perry* identified three categories of public property for First Amendment purposes: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 473 U.S. at 802 (citing *Perry*). A traditional or "quintessential" public forum is an area that "by long tradition" has been "devoted to assembly and debate" (*Perry*, 460 U.S. at 45). Public streets and parks are the paradigm examples of property that has "time out of mind" been held open for communicative activity.

A second category consists of areas not traditionally dedicated to public expression but intentionally

opened by the government for that purpose. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." *Cornelius*, 473 U.S. at 802. The government must treat property it has chosen to hold open for expressive activity as a public forum "even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45. However, government property becomes a "public forum by designation" only if it has been opened "for indiscriminate use by the general public" or "permission has been granted as a matter of course to all who seek to [use the forum]." *Id.* at 47. "[S]elective access does not transform government property into a public forum." *Ibid.* And if the government creates a forum that is open to selected types of speakers, or is reserved for the discussion of certain subjects, "the constitutional right of access would * * * extend only to other entities of similar character." *Id.* at 48. A nonpublic forum, on the other hand, is public property that has "not by tradition or designation [been] a forum for public communication," but has been reserved by the government "for its intended purposes." *Id.* at 46.

These principles have been applied to determine whether specific government-controlled property should be classified as a public forum, from which expressive activity cannot be barred absolutely, or a nonpublic forum, in which the government has greater power to limit or preclude the exercise of First Amendment rights. In those cases where the Court found that the property was not traditionally dedicated to the public exercise of First Amendment rights, but had been reserved by the government for other purposes, the Court declined to identify the

property as a public forum. See *Adderley* v. *Florida*, *supra* (jailhouse grounds); *Greer* v. *Spock*, *supra* (1976) (military installation); *Lehman* v. *City of Shaker Heights*, *supra* (advertising space in municipal buses); *Greenburgh*, *supra* (mailboxes); *Taxpayers for Vincent*, *supra* (municipal utility poles); *Cornelius*, *supra* (federal workplace charity drive); *Minnesota State Board of Community Colleges* v. *Knight*, 465 U.S. 271 (1984) (meeting of school community).

Thus, in *Greer* v. *Spock*, 424 U.S. at 838, the Court observed that the primary business of a military installation "[is] to train soldiers, not to provide a public forum." In *Greenburgh*, 453 U.S. at 128-129, the Court acknowledged that the history of the exclusive dedication of home mailboxes to the "delivery and receipt of mail" defeated any claim that mailboxes were public forums. And in *Cornelius*, 473 U.S. at 805, the Court justified restrictions on the types of organizations allowed access to the Combined Federal Campaign by pointing out that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer."

Likewise, the premises on which postal facilities are located have no strong and established history of regular use as a "quintessential" public forum. Indeed, no evidence in the record suggests a tradition of protests, demonstrations, assembly, debate, or other forms of public expression on Postal Service access walkways that are located entirely on postal premises. On the contrary, it is plain that "[t]he Government did not create the [post office] for purposes of providing a forum for expressive activity." *Cornelius*, 473 U.S. at 805. In contrast to "open spaces, * * * [a] meeting hall, park[s], street corner[s], or other public thoroughfare[s]" (*Lehman* v. *City of Shaker*

Heights, 418 U.S. at 303), the property acquired by the Postal Service as a site for its postal facilities has been designed exclusively for the conduct of specific government business—the expeditious deposit, processing, sorting, receipt, and delivery of the mails—and has been devoted to that purpose.

The Postal Service is embarked on a vast commercial endeavor. Its facilities are laid out across the country for the purpose of permitting it to achieve its ambitious undertaking—not for the purpose of providing forums for expressive activity. In this respect, this case is closely analogous to *Lehman* v. *City of Shaker Heights*, *supra*. There the Court found that advertising card space on municipal buses owned and operated by the city of Shaker Heights was not a public forum. Like the bus advertising space in *Lehman*, the buildings and grounds of postal premises are "incidental to the provision of [services]" and are "part of the commercial venture." 418 U.S. at 303. And just as the Court in *Lehman* found that "the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum," the Court here should, for the same reason, be "particularly reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. In both situations, "the principal function of the property would be disrupted by expressive activity." *Ibid.* (citing *Lehman*). "At some point the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814 n.31. The government has achieved that relationship in establishing the Postal Service and in acquiring across the country property necessary for the Service to carry out its functions.

b. In light of the underlying principles of public forum analysis, it is equally clear that not every area that lies out of doors, is situated on government property, and contains sections of pavement or grassy enclaves that resemble streets, parks, or sidewalks, has public forum status. In *Adderley* v. *Florida*, *supra*, for example, a group of students held a demonstration on the grounds of a jail to protest racial segregation. The Court upheld their convictions for trespass, concluding that the protestors had no constitutionally protected right to use jailhouse grounds for expressive activity. In *Greer* v. *Spock*, *supra*, protesters conducted a demonstration in a military reservation (Fort Dix, New Jersey) open to the public and containing roads and pedestrian footpaths. 424 U.S. at 830. Nevertheless, the Court held that the protesters could be excluded from the streets and sidewalks because Fort Dix was not a public forum. "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens," the Court observed, is "historically and constitutionally false." *Id.* at 838.

The decisions in *Greer* and *Adderley* lay to rest any notion that "all sidewalks, wherever located, are fungible, and are public forums." Pet. App. 18a (Widener, J., dissenting). In both cases, areas having physical features in common with traditional public forums were found to be reserved by the government for a specialized use, and were held *not* to be open to the public for First Amendment activities. Thus, the fact that an area bears a geographical resemblance to traditional public forum property does not transform it into a place suitable for unrestricted

public assembly or debate. Cf. *Lloyd* v. *Tanner*, 407 U.S. 551, 563 (1972) (rejecting the notion that privately owned sidewalks of a shopping center are "the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"). It is the *use* to which government property is put or for which it is designated, not its physical form, that determines whether it is a public forum. This is evident from this Court's decisions applying forum analysis to charitable campaigns, student activity programs, and mailboxes. A contrary approach such as that embraced by the majority below would suggest that almost any horizontal strip of concrete located on publicly owned property would have to be considered a public forum.

The court of appeals justified its conclusion that the Bowie post office walkway was a traditional public forum by observing that "most sidewalks are designed as outdoor public thoroughfares" (Pet. App. 6a), and are therefore "a particularly public and * * * appealing forum." *Id.* at 7a. In addition, the majority below feared that any attempt to distinguish off-street access walkways from ordinary public sidewalks would leave pedestrians "to wonder" where expression was permitted. *Id.* at 6a. Neither of these considerations justifies the lower court's ultimate conclusion.

As we have explained, the proper test for whether a forum is public is not whether it bears a physical resemblance to property that is used, in other contexts, for assembly or debate. "Identifying a portion of government property as a sidewalk does not end the inquiry." Pet. App. 18a-19a (Widener, J., dissenting). Rather, the test is whether, through its physical separation from property devoted to more

general use, and its dedication to a specific function, the property is reserved by the government for a defined purpose.

Although "most sidewalks" serve as general public thoroughfares, a great many public buildings throughout the country contain access walkways that do not function in this manner. Rather, these walkways are designed to funnel employees and patrons to and from the buildings they serve. The walkway at issue in this case serves just such a purpose. It is not a general thoroughfare providing access to a variety of locations.[7]

For this reason, this case is readily distinguishable from *United States* v. *Grace*, 461 U.S. 171, 179 (1983). In that case, the Court struck down a regulation curtailing First Amendment activity on municipal sidewalks "comprising the outer boundaries of the Court grounds." In *Grace*, the Court observed that the perimeter sidewalks defining the boundaries of the Supreme Court were neither physically nor functionally distinct "from any other sidewalks in Washington, D.C.," and the Court detected no "discern[ible] * * * reason why they should be treated any differently." *Ibid.* In this case, in contrast, there *are* readily discernible geographical and functional differences between an ordinary municipal sidewalk and the Bowie post office access walkway. The loca-

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[7] Rather, as the magistrate found, the walkway leading up to the entrance of the post office did not provide access to any other place of business and was "for the sole and exclusive purpose of ingress and egress to * * * the Post Office." J.A. 81. Likewise, the district court found that the walkway was used exclusively to carry customers the short distance from the post office parking lot to the post office building. Pet. App. 24a.

tion of the walkway entirely on Postal Service property, its physical separation from the municipal sidewalk, and its exclusive role of carrying patrons to and from the post office (and no other place) justify a distinction for First Amendment purposes.

The importance of these factors in supporting a distinction among forums with otherwise similar physical features is confirmed by the Court's analysis of *Greer* v. *Spock*, *supra*, in *Grace*. As the *Grace* Court explained, its prior ruling in *Greer* was based on its consideration of both the geography and function of the Fort Dix military base, as well as the history of the commanding officer's authority to exclude civilians from military installations (*Greer*, 424 U.S. at 838) and not, as the court of appeals suggested, solely on the unique status of property reserved to the military. See Pet. App. 7a. The streets and sidewalks in *Greer* were "located within an enclosed military reservation * * * and were thus separated from the streets and sidewalks of any municipality." *Grace*, 461 U.S. at 179. By contrast, in *Grace*, there was "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks * * * that they have entered some special type of enclave." *Id.* at 180.[8]

[8] Like many post offices and other public buildings, the Supreme Court grounds include nonpublic sidewalks. In *Grace*, the Supreme Court distinguished the Court's building and grounds from the public sidewalks. 461 U.S. at 175. Although the Court affirmed the decision of the court of appeals insofar as it held that the prohibition of expressive activity on the sidewalks surrounding the Court was unconstitutional, it vacated the court of appeals' decision to the extent that it struck down the statutory ban on First Amendment activity in the building or on the grounds. *Id.* at 184.

In this case, as in *Greer*, the walkway at issue—which is set back from the street and plainly dedicated to post office use—is readily distinguishable from an ordinary municipal sidewalk. It is evident to the most casual observer that the area is not a general public thoroughfare, but is designed exclusively to facilitate post office business. For this reason, the court of appeals' concern (Pet. App. 6a) that citizens would be left to wonder what forms of expression would be permitted in the area is misplaced. In this case and *Greer*, in contrast with *Grace*, the differences between the property at issue and an ordinary municipal sidewalk are based on readily apparent geographical features that do not create a trap for the unwary.[9]

c. The court of appeals also placed considerable emphasis on the fact that the general public was allowed free and unrestricted access to the postal service walkway. But "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Grace*, 461 U.S. at 177; *Greenburgh*, 453 U.S. at 131 n.7; *Greer* v. *Spock*, 424 U.S. at 836 ("the principle that whenever members of the public

Cf. *Chicago Area Military Project* v. *City of Chicago*, 508 F.2d 921, 926 (7th Cir.) (distinguishing between general public areas of airport and "fingers" leading to the arrival and departure gates), cert. denied, 421 U.S. 992 (1975).

[9] In this case, anyone with a question about the postal premises walkway need only ask in the post office, at which point he could be directed to the pertinent regulation, which is required to be displayed. In any event, there is no issue of bewilderment here. When Ms. Kokinda was presented with a copy of the pertinent regulations and asked to leave, she "told the inspectors that she did not need to look at the regulations, since she already knew them." Pet. App. 26a.

are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment * * * has never existed, and does not exist now"). Cf. *Lloyd* v. *Tanner*, 407 U.S. at 564-566 (areas open to the public are not necessarily open for all purposes). The majority below thus "misapprehend[ed] the scope of the invitation extended to the public by the [Postal Service]. The invitation is to come to the [post office] to do [postal] business," not to solicit contributions or sell subscriptions. *Id.* at 564.

Nor can it matter that the walkway leading up to the post office entrance is a "particularly * * * appealing forum" (Pet. App. 7a). Many places of business provide attractive stations for persons engaged in commercial or political activity. But however much a speaker may wish to attract the attention of large numbers of people, the desire to take advantage of the "volume of traffic" (*ibid.*) that may congregate on government-owned property has never sufficed to confer public forum status on property reserved for a special use. The government is under no obligation to deliver an audience for those who wish to express their views, and "the First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809; see also *Greenburgh*, 453 U.S. at 129; *Lehman*, 418 U.S. at 302-303.

In addition, the majority below was mistaken in reasoning that the capacity of the post office walkway to "accommodate * * * uses" other than postal business transforms it into a public forum. Pet. App. 6a. "[T]he mere fact that government property can be used as a vehicle for communication does not mean

that the Constitution requires such uses to be permitted." *Taxpayers for Vincent*, 466 U.S. at 814; see also *Greenburgh*, 453 U.S. at 131. It is only with regard to property that has *not* been reserved for a specialized purpose, but has customarily served as an arena for the public expression of ideas—that is, public forum property—that "[t]he crucial question" for evaluating restrictions on speech "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. at 116; *Cornelius*, 473 U.S. at 808. But the fact that government property might conceivably be "use[d] as a forum for the peaceful expression of political views" (Pet. App. 6a) has never been sufficient to mandate such use.

3. Nor has the Postal Service transformed the access walkways to its facilities into public forums by its previous practice of permitting certain groups to use postal facilities for fundraising or by failing to prohibit certain other forms of expressive activity altogether. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. In particular, "selected access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* at 805.

The history of postal service regulations governing the availability of postal property to the public for the exercise of First Amendment rights reveals that the government has not intentionally created a forum for speech. The use of postal facilities by the general public, both before and after the Postal Service was created in 1970, has always been limited to designated

groups and activities. The Postal Service has made postal premises available on a limited basis for certain kinds of expressive activity unrelated to postal business, such as leafletting and distribution of literature, that do not tend to interfere with the operation of the post office. However, it has allowed access for fundraising purposes only to selected organizations, and has conferred authority on postal officials to refuse permission to conduct these activities if the normal business of the post office would be unduly disrupted or impeded. Thus, even before the current no-solicitation rule was implemented in 1978, fundraising and solicitation could be conducted only by nonprofit health, welfare, or veterans' organizations at the discretion of Postal Service officials and, after 1973, only if the activities did not "prevent, unduly impair, or interfere with the transaction of business or the provision of postal services to the public." 39 C.F.R. 232.6(h)(2) (1973); 37 Fed. Reg. 24,347 (1972).[10]

[10] Before enactment of the 1970 Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 720, 39 U.S.C. 201 *et seq.*, the Post Office Department's internal guidelines "strictly prohibited" the "[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections * * * in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines" of postal premises. *Postal Service Manual, Facilities Transmittal Letter 8, Buildings Operation: Buildings Operated by the Post Office Department* § 622.8 (1958). In 1963, an exception was created to enable certain "established health, welfare, and veterans' organizations" to conduct fund drives on postal premises with the local postmaster's permission, and at his discretion. *Facilities Transmittal Letter 53, Buildings Operation: Buildings Operated by the Post Office Department* § 622.8 (1963).

In March 1971, pursuant to power granted by Congress to the newly created Postal Service "to adopt, amend, and repeal such rules as it deems necessary to accomplish [its] objectives * * *" (39 U.S.C. 401(2)), the Postal Service issued new regulations that largely preserved the *status quo*. See 36 Fed. Reg. 4766 (1971), codified at 39 C.F.R. 243.3(a) (1972).

A year later, the Postal Service revised and expanded its general prohibition on solicitation, Section 243.3(a)(5), to include "[s]oliciting alms and contributions or collecting private debts on postal premises." 37 Fed. Reg. 24,347 (1972), re-codified at 39 C.F.R. 232.6(h)(1) (1973). Soon thereafter, the Postal Service revised the language of the exemption to the no-solicitation rule to encompass "[n]ational organizations which are wholly nonprofit in nature and which are devoted to charitable or philanthropic purposes" and "[l]ocal charitable and other nonprofit organizations" (39 C.F.R. 232.6(h)(2), (3) (1974)), and to permit these organizations to "request use of lobby space for annual or special fund raising campaigns, providing they do not interfere with the transaction of postal business or require expenditures by the Postal Services or the use of its employees or equipment." 38 Fed. Reg. 27,824-27,825 (1973); see 39 C.F.R. 232.6(h)(2) (1974) (permitting postmasters to restrict solicitations that "prevent, unduly impair, or interfere with the transaction of business or provision of postal services to the public"). Finally, in August 1978, the Postal Service implemented new regulations that banned solicitation entirely.

The past practice of conferring broad discretionary authority on local administrators to deny permission to all but a few organizations seeking occasional access, and the longstanding requirement that prior approval from Postal Service administrators be obtained for solicitation, are incompatible with any intent to create a public forum. See, *e.g.*, *Cornelius*, 473 U.S. at 803 (contrasting the "general access policy" in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), manifesting the creation of a public forum "by designation," with the practice of requiring permission from school officials for access to the nonpublic forum school mail-

box system in *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, *supra*). But even if previous versions of the postal regulations had the effect of creating a limited public forum, the decision to ban *all* solicitation in 1978 plainly altered the character of the forum. "Of course, the government 'is not required to indefinitely retain the open character of the facility.'" *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 46). The Postal Service's decision to prohibit a particular manner of expression falling within a defined category is fundamentally incompatible with the creation of a designated public forum.

B. The Ban on Solicitation on Postal Premises is a Legitimate Restriction on Speech in a Nonpublic Forum

The post office walkway at issue in this case is neither a traditional public forum nor a public forum by designation. With respect to First Amendment activity conducted on property found to be a nonpublic forum, the government may impose limitations that are reasonable and not motivated by a desire to suppress the speaker's viewpoint. *Perry*, 460 U.S. at 46. Moreover, a restriction on expression in a forum created for a defined purpose

> need only be *reasonable*, it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. • • • Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling.

Cornelius, 473 U.S. at 808-809. "The reasonableness of the Government's restriction of access to [the] forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Ibid.*

Under this standard, the Postal Service's prohibition on solicitation is clearly valid. First, the no-solicitation rule does not pick and choose among speakers on the basis of point of view or subject matter, and is thus content-neutral. Second, in enhancing the government's ability to provide postal patrons with prompt, reliable, and efficient service, the prohibition is "reasonable in light of the use to which the building and grounds are dedicated." *Grace*, 461 U.S. at 178. City or suburban post offices frequently are busy and crowded. Access walkways and entryways such as the one at issue here carry a significant volume of traffic to and from the post office building. Although it is for this very reason that access areas are attractive to persons seeking public attention for their cause, the crowds of patrons also contribute to congestion that interferes with the expeditious conduct of postal business. Pedestrians use the walkway at issue for one purpose and one purpose only—to get to and from the post office—and solicitation interferes with that purpose. Where solicitation occurs at the few entrances through which all patrons must pass, it is even more likely to result in the delay and annoyance of significant numbers of customers. Thus, the regulation advances the government's interest in providing postal patrons with unimpeded access to the premises, and with reliable and pleasant service.

Moreover, customers may steal precious time from the workday or the weekend to make a trip to the post office to conduct essential business. Whatever may have been the case in times past, few people nowadays go to the post office simply to pass the time—

and certainly not to the Bowie post office off busy Route 197. Thus, quick access to services is of great value to patrons, and the Postal Service has a legitimate interest in removing any unnecessary distractions or impediments to prompt and efficient service.

The interest of the Postal Service in creating an attractive and desirable setting for the conduct of postal business takes on special importance in light of Congress's goals in abolishing the Post Office Department, which had administered the mails since 1789, and creating the Postal Service. See *National Ass'n of Greeting Card Publishers* v. *USPS*, 462 U.S. 810, 813 (1983). As previously noted, the express purpose of the Postal Reorganization Act of 1970 was to "improve and modernize" the Nation's postal system so that it would be less of a drain on the Treasury. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). In directing the Postal Service to achieve greater self-sufficiency (see *id.* at 10), and in anticipation that the Service would eventually become self-supporting, Congress created a new rate structure designed to make the Postal Service financially independent, see 39 C.F.R. 3621, and a schedule of reductions in federal appropriations to the Service, see 39 C.F.R. 2401(b)(1) and (2).

"Basic to the Act [was] the principle that, to the extent 'practicable,' the Postal Service's total revenue must equal its costs." *National Ass'n of Greeting Card Publishers*, 462 U.S. at 813. In restructuring the postal system in service of this goal, the Postal Reorganization Act "launched [the Postal Service] into the commercial world." *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 520 (1983); see also *Loeffler* v. *Frank*, 108 S. Ct. 1965, 1969-1970 (1988). Congress recognized that the Postal Service could only achieve economic success if it was operated "efficiently and

economically" (H.R. Rep. No. 1104, *supra*, at 19) and in a "businesslike way." *Id.* at 5, 11-12. It therefore made clear that "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board*, 467 U.S. at 519-520 & n.13.

Accordingly, Congress sought to "[e]liminate serious handicaps that are now imposed on the postal service by * * * policies that are * * * inconsistent with * * * modern management and business practices." H. R. Rep. No. 1104, *supra*, at 2. Congress also recognized that the ability of the Postal Service to pay its own way would depend on attracting customers, competing with private delivery and communications services, and increasing the volume of business. Congress thus directed the Service to "seek out the needs and desires of its present and potential customers—the American public" (*id.* at 19) and to provide services in a manner "responsive[]" to the "needs of the American people." *Id.* at 20.

The Postal Service faces growing competition from private parcel services, overnight delivery services, and electronic mail for some its most lucrative business. See *Competitors and Competition*, *supra*. The Postal Service's competitors are not constrained by rules that require them to share their facilities with public advocacy groups. Customers visiting a Federal Express or DHL outlet, for example, are not required to run a gauntlet of hawkers bombarding them with questions about social issues and importuning them to donate money or subscribe to a particular journal of opinion. Like those private delivery services, the Postal Service should be able to shield its customers from unreasonable interference and annoyance, and to provide a businesslike setting in which patrons can

purchase services undisturbed by unwelcome confrontations. Cf. *Lloyd* v. *Tanner*, *supra*.[11]

The court of appeals' suggestion that customer dissatisfaction (and the attendant disruption caused by customer protests) is an invalid consideration rests on an erroneous assumption—that the walkway is a public forum rather than part of a place of business. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811. What is more, in suggesting that the no-soliciation rule permitted a "heckler's veto" of unpopular or unwelcome speakers, the majority below mischaracterized the purpose of the regulation. The no-solicitation rule is not based on a desire to protect patrons from "annoyance arising from the content of the speech," but rather from "annoyance arising from the mere physical intrusion of the communication on the public's senses." Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 146 (1975). It is directed at the delay, distraction, and clutter occasioned by public solicitations in a place of business, and is designed to minimize the annoyance that customers experience at having their attention drawn away from the business at hand. The government's interest in protecting postal patrons from such intrusions is a content-neutral and valid justification for its regulation.

Moreover, the no-solicitation rule does not pick and choose between speakers or points of view. Nor is it

[11] This concern is hardly academic. In the few hours respondents were at work on postal premises, the post office received 40 to 50 complaints about their activities. Pet. App. 3a, 13a.

directed at protecting postal patrons from controversial views, since those views may be delivered at the same site by other means. And the reasonableness of the government's efforts to protect patrons from harassment is not defeated by the possibility that a solicitor's message, in addition to his presence, may contribute to the annoyance felt by some customers. The regulation, which is neutral on its face, is enforced in an evenhanded manner against all persons regardless of the frequency of customer complaints or their motivation.[12]

The differences between solicitation and other forms of First Amendment activity justify the decision to prohibit sales and solicitation, while at the same time permitting other forms of expression, including leafletting and public discussion. An attempt to make a sale or solicit contributions is more likely to draw a customer into a direct confrontation with the solicitor. It may engender a prolonged encounter, an explanation of the organization's goals, the exchange of money, or other interaction commonly associated with solicitations. In the view of Justice Blackmun, in his concurrence in *Heffron* v. *International Society of*

[12] The reasonableness of the no-solicitation rule is enhanced by the fact that the post office is often the only place where certain postal business can be conducted. Postal patrons are a "captive audience" in the sense that they cannot avoid visiting the post office for many necessary services. Cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. at 302. "[T]he more one's presence in a public space is founded on necessity, the stronger is the claim to be free from annoyance there." Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 144 (1975). The ban on solicitation, by enabling patrons, who must come to the post office, to avoid unwelcome, awkward confrontations, thus serves the reasonable goal of protecting patrons' privacy.

Krishna Consciousness, Inc., 452 U.S. 640, 665 (1981), just such "common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other," justified stringent restrictions on the location of the latter activity at a Minnesota State Fair. He explained (*ibid.*):

> The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. * * * [S]ales and the collection of solicited funds not only require the fairgoer to stop, but also "engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc."

See also *United States* v. *Bjerke*, 796 F.2d 643, 651 (3d Cir. 1986); *National Anti-Drug Coalition, Inc.* v. *Bolger*, 737 F.2d 717, 725-726 (7th Cir. 1984).

The Postal Service's decision to ban all solicitation, in light of its previous experience with rules permitting selective fundraising by charitable organizations, was based on similar considerations. As the Postal Service explained:

> The solicitation of alms and contributions is an inherently more aggressive form of conduct, and more likely to hinder the orderly transaction of postal business, than is the expression of ideas.
>
> Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor. Such confrontations * * * [in] places from which the individual cannot escape if he or she wishes to transact postal business—would be likely to produce hostile reactions and to cause people to avoid post offices.

43 Fed. Reg. 38,825 (1978).

In addition, as other courts of appeals have observed, "[o]ne factor bearing on the reasonableness of [the no-solicitation] restriction is the existence of alternative channels of communication." *United States* v. *Belsky*, 799 F.2d 1485, 1489 n.9 (11th Cir. 1986); see also *United States* v. *Bjerke*, 796 F.2d at 650. "Rarely will a nonpublic forum provide the only means of contact with a particular audience." *Cornelius*, 473 U.S. at 809. In this case, the regulation forbids only one type of First Amendment activity, and applies to a very limited geographic area. "The municipal sidewalks and streets adjoining the postal buildings remain open as public forums for expressive activity." *Belsky*, 799 F.2d at 1489. Thus, "the speakers have access to alternative channels" to accomplish the same fundraising purpose, "including * * * in-person solicitation [in nearby locations.]" *Cornelius*, 473 U.S. at 809. Also, as already noted, the Postal Service regulations do not prohibit the distribution of literature. "The literature can inform the readers how to contact the organization and contribute funds if they so desire." *Belsky*, 799 F.2d at 1489 n.9.[13]

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[13] Further, a concern for orderly and aesthetic appearance is sufficient to justify even categorical restrictions on expressive activity. *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508 (1981); *Taxpayers for Vincent*, 466 U.S. at 805, 808; *Harnish* v. *Manatee County*, 783 F.2d 1535, 1539 (11th Cir. 1986). An additional purpose underlying the 1978 revisions in the regulations was the desire to create a professional appearance. Solicitors' displays of varying sizes, styles, and

Another reason for the categorical ban on solicitation was the desire to minimize "unnecessary, nonmission related administrative burdens on the Postal Service" (42 Fed. Reg. 63,911 (1977)) by avoiding the difficult task of administering a case-by-case system of access to postal facilities nationwide. In recognition of the difficulties of operating a far-flung network of diverse postal facilities, this Court has stated that Congress is entitled to "legislate with the generality of cases in mind, and should not be put to the test of defending in one township after another the constitutionality of a statute under the traditional time, place, and manner analysis." *U.S. Postal Service* v. *Greenburg Civic Ass'ns*, 453 U.S. 114, 132-133 (1980). As the Court explained further:

> If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail * * * [they] must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

Id. at 133.

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levels of maintenance scattered about the premises were felt to contribute to a "cluttered, disorderly appearance," which presented an unsightly and unbusinesslike image to the public. 42 Fed. Reg. 63,911 (1977). In an effort to eliminate clutter, the regulations also prohibited the depositing and posting of written materials, other than official postal or governmental notices, in places other than authorized bulletin boards. 39 C.F.R. 232.1(o) (1978); 42 Fed. Reg. 63,911-63,912 (1977).

The unsatisfactory experience of the Postal Service with its previous program of selective access to postal premises confirmed the need for "regulations of general character having uniform applicability." See 42 Fed. Reg. 63,911 (1977); 43 Fed. Reg. 38,824-38,825 (1978). Administration of the previous regulations governing soliciting at the approximately 30,000 independent post offices and 5000 branches and postal stations nationwide had proved virtually unworkable. The Postal Service found that "even the limited activities permitted by this program" produced "highly unsatisfactory results." 42 Fed. Reg. 63,911 (1977). Because of a constant demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary task of running the post office by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. The absence of a security force at many smaller facilities made it difficult to monitor and enforce compliance with the regulations. See 43 Fed. Reg. 38,824 (1978). And the number and diversity of organizations seeking privileges made it hard to administer the program in a manner that did not appear discriminatory or create the danger of "unequal application" of the rules. 42 Fed. Reg. 63,911 (1977). Finally, the system unavoidably required the exercise of a great deal of discretion by thousands of local postal officials. The Postal Service was unable effectively to monitor this decentralized system, which enhanced fears that unpopular or controversial groups were being discriminated against, and that the regulations were being applied in an unconstitutional manner. *Ibid.* Cf. *Cox* v. *Louisiana*, 379 U.S. at 557-558; *Heffron*, 452 U.S. at 649; *City of Lakewood* v. *Plain Dealer*

Publishing Co., 108 S. Ct. 2138, 2147 (1988); *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746, 2755 (1989).

The alternative of requiring each post office to develop and enforce regulatory guidelines tailored to the needs of that facility was rejected as unduly burdensome. And the possibility of devising detailed time, place, and manner regulations applicable to thousands of different facilities throughout the Nation was rejected as likely to result in rules "so complex as to be unadministrable." 43 Fed. Reg. 38,824 (1978). The blanket ban eliminated the danger of arbitrary denial of access while, at the same time, obviating the need to devise overly complex rules that could be easily applied throughout the Nation. The ease with which the no-solicitation rule could be enforced, and the difficulties of administering alternative systems, provide added justification for the choice of this method for regulating expressive activities on postal premises.

C. Even if the Bowie Post Office Off-street Walkway Were a Public Forum, the No-Solicitation Rule Would Be a Constitutionally Valid "Time, Place, or Manner" Restriction

Even if this Court finds that the Bowie post office walkway is a traditional public forum for First Amendment purposes, the no-solicitation rule would still withstand scrutiny as a permissible "time, place, or manner" regulation. See *Bolger*, 737 F.2d at 723-728 (Postal Service regulation banning outdoor solicitations on postal premises is a valid "time, place, or manner" regulation of speech in a public forum). See also *Perry*, 460 U.S. at 45; *Heffron*, 452 U.S. at 647; *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984); *Frisby* v. *Schultz*, 108

S. Ct. at 2500-2502; *Ward* v. *Rock Against Racism*, 109 S. Ct. at 2753.

"[T]he appropriate level of scrutiny is initially tied to whether [a regulation] distinguishes between prohibited and permitted speech on the basis of content." *Frisby* v. *Schultz*, 108 S. Ct. at 2500. If a limitation discriminates on the basis of content or viewpoint, it must be narrowly tailored to serve a compelling state interest. If, however, the regulation is content-neutral, it must satisfy the less exacting requirement of being "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication." *Perry*, 460 U.S. at 45. The no-solicitation rule is just such a neutral restriction. It targets a particular "manner" of expression—sales and solicitations of contributions—without regard to the content of the message or the identity of the speaker. Thus, the regulation need only satisfy the requirement that it serve a "significant" governmental interest, sweep no more broadly than necessary to accomplish its articulated purposes, and leave open alternatives for expressive activity.

The no-solicitation rule meets this standard. The regulation contains restrictions on both the "place" and "manner" of expression. It singles out a narrowly defined form of expression—solicitation—and prohibits that type of activity in a limited and well-defined location. As we have explained, see p. 39, *supra*, the regulation leaves open ample possibilities for communication—including solicitation—by other means and in other nearby places. Advocacy groups have access to postal premises to distribute literature that "adequately explain[s] the organization, how to obtain a membership, and where to send any contribution. In this way, * * * organization[s]

could convey [their] message without disrupting postal business and the recipient would be free to read the message at a later time." *Bolger*, 737 F.2d at 728. And individuals can conduct their fundraising activities without restriction on the nearby municipal sidewalk.

That the no-solicitation rule forbids the use of one method of communication does not make it an invalid restriction. "A categorical ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 108 S. Ct. at 2502-2503. See also *id.* at 2502 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Thus, in *Taxpayers for Vincent*, the Court upheld a municipal ban on the posting of signs on public property

> because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil—visual blight—[was] * * * created by the medium of expression itself."

Frisby v. *Schultz*, 108 S. Ct. at 2503 (quoting *Taxpayers for Vincent*, 466 U.S. at 810). Similarly, in *Heffron*, 452 U.S. at 640, a rule that required that solicitations at a state fair be conducted from a booth rented for that purpose was found to be a valid "time, place, and manner" restriction even though it significantly curtailed the Hare Krishna practice of Sanskirtan, or mingling among the crowds to solicit donations. And in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court refused to invalidate a blanket ban on expressive "sleeping" in parks in Washington, D.C., finding that "the

regulation narrowly focus[ed] on the Government's substantial interest in maintaining the parks * * * in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them." *Id.* at 296. Finally, in *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949), the Court ruled that a flat, citywide prohibition on the use of sound trucks "emitting loud and raucous noises" was not unconstitutional, because the city's interest in noise control was significant, the rule was narrowly targeted to the problem of excessive noise, and numerous alternative means of disseminating the speaker's message were still available.

By confining the scope of the proscription to soliciting and vending on postal premises, the regulation at issue here meets the requirement that it be narrowly tailored to serve its underlying purpose. As already discussed, solicitation is by its very nature more assertive and aggressive than many other forms of communication. In seeking to advance the important goals of reducing congestion and clutter at crowded facilities, minimizing delays in service and disruption of postal business, and creating a pleasant and efficient business environment, the regulation, by eliminating only the most intrusive form of advocacy, responds "precisely to the substantive problem[s] which legitimately concern[] the [government]." *Taxpayers for Vincent*, 466 U.S. at 810. Its scope is not "unrelated to the ends that it was designed to serve" (*Clark*, 468 U.S. at 297), and it is no broader than necessary to accomplish its intended purpose, since it affects only the type of activity that most threatens to disrupt the smooth and professional operation of postal facilities.[14]

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[14] In regard to the extent of interference with protected First Amendment activities, the significance of the underlying

In addition, if the access walkway is considered a public forum, then there is no basis for distinguishing it from the nearby municipal sidewalk for First

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government interest advanced by the regulation, and the tailoring of the scope of the prohibition to serve the underlying rationale, the no-solicitation rule at issue here is far more acceptable than the provisions at issue in *Schneider* v. *State*, 308 U.S. 147 (1939) and *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

In *Schneider*, the Court struck down city ordinances that banned the distribution of handbills on all public streets, including an ordinance that prohibited "canvass[ing], solicit[ing], distribut[ing] circulars, or other matter, or call[ing] from house to house" without a permit. 308 U.S. at 157. These provisions swept far more broadly than the regulation at issue here, since they affected solicitation in an entire city rather than in a confined area, and failed to leave open the alternative methods of simple distribution of informational literature in the place where solicitation was banned. Also, the Court found that the city could more precisely and as easily accomplish the goals of the ban—to prevent littering and maintain a neat appearance—by alternative means, such as "regulations against throwing literature broadcast in the streets." *Id.* at 160-161. Here, in contrast, more finely tuned alternatives to a rule prohibiting solicitation have already been tried, and have been shown to pose insurmountable administrative difficulties or to present an intolerable potential for arbitrariness and abuse.

Similarly, in *Schaumberg*, the Court struck down an ordinance that prohibited door-to-door solicitation by organizations that devoted less than 75% of contributions to charitable purposes. Once again, the rule in *Schaumberg*, which applied throughout an entire village, was far more extensive in scope than the prohibition here. Second, the Court found that the "broad prophylactic rule" enacted by the village did not meet the requirement that it be narrowly tailored. The reason given by the village for the 75% limitation—"preventing fraud"—could be "better served by measures less intrusive than a direct prohibition on solicitation." 444 U.S. at 637.

Amendment purposes. In that case, a regulation that prohibits solicitation on the access walkway lying entirely on postal premises is simply a "place" regulation that moves expressive activity from one part of a public forum to another. Cf. *Boos* v. *Barry*, 108 S. Ct. 1157, 1169 (1988) (upholding "congregation" clause that forbids any demonstration directed at an embassy within 500 feet); *Frisby* v. *Schultz*, *supra* (ordinance prohibiting focused picketing in front of, and directed at, a residence); *Cox* v. *Louisiana*, 379 U.S. 559, 568-570 (1965) (ordinance banning demonstrations "near" a courthouse); *Heffron*, 452 U.S. at 640 (regulation confining solicitations and vending to pre-assigned booths on state fairgrounds). To the extent that the Postal Service regulation, in effect, precludes solicitation in only that portion of a public forum where expression causes maximum disruption, it is a valid and narrowly drawn restriction on the location of speech. It is no less reasonable to banish solicitations from that portion of a public forum that serves as an access walkway to a busy public building than it is to restrict soliciting to selected, pre-assigned areas of the grounds of a state fair, see *Heffron*, *supra*; to require public demonstrations directed at a foreign embassy to remain at least 500 feet from the building, see *Boos* v. *Barry*, *supra*; or to forbid focused picketing directly in front of a private residence, see *Frisby* v. *Schultz*, *supra*. In each of these cases, a significant governmental interest was served by the restrictions imposed on the location of expression, and the scope of the rule was no more extensive than necessary to serve the interest. So too here the ban—which only applies to the walkway that lies between the post office parking lot and building and serves as the conduit for postal service traffic—is

narrowly tailored with respect to the location of the restriction. The nearby municipal sidewalk—which lies approximately 77 feet away—is readily available for the same activity.[15]

Nor can it be objected that the no-solicitation regulation fails to meet the requirements for a valid restriction in a public forum because it bans one form of expression from the entire access walkway, rather than some portion of it. The fact that it might be possible to imagine "less speech-restrictive alternatives that could have satisfied the Government interest" is not enough to render a regulation invalid. *Clark*, 468 U.S. at 299. Rather, the Court has "refrained from imposing a least-restrictive-means requirement—even when core political speech is at issue—in assessing the validity of so-called time, place, and manner restrictions." *Bd. of Trustees of State Univ. of N.Y.* v. *Fox*, 109 S. Ct. 3028, 3033 (1988). Although a regulation "must be narrowly tailored to serve the government's legitimate content-neutral interest," it "need not be the * * * least intrusive means of doing so." *Ward* v. *Rock Against Racism*, 109 S. Ct. at 2757-2758. Rather, all that is necessary is that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interest" and that it not be the case that "a substantial portion of the burden on speech [fails] to advance its goals." 109 S. Ct. at 2758.

[15] The degree to which the volume of traffic on the municipal sidewalk may be somewhat less than on the postal walkway would not be significant enough to defeat the constitutionality of this provision. The government may not confine all expression to "an area that [it] has provided as a safe haven for crackpots." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969). However, a regulation that places well-defined limits on expression in a particular place or regulates a particularly disruptive manner of speech is not necessarily invalid simply because it makes it harder for the speaker to reach his intended audience, or cuts down on the number of individuals to whom he has ready access. "That more people may be more easily and cheaply reached * * * is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs* v. *Cooper*, 336 U.S. at 88-89.

The no-solicitation regulation easily meets this standard. This is especially so when the important goals of uniformity and administrative efficiency are weighed in the balance. "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-651 (citing *Grayned* v. *City of Rockford*, 408 U.S. at 116-117). This is not a case in which a few officials administer a system of access regulations in a limited area. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, *supra* (ordinance granting mayor authority to grant or deny application for permit to place newsracks on public city property). The Postal Service is charged with administering a far-flung network of thousands of diverse facilities. Moreover, its employees are fully occupied with the task of delivering billions of pieces of mail in a prompt and cost-effective manner. In view of the "characteristic nature and function" of the Postal Service, the interest of the Postal Service in relieving its personnel of the task of devising and administering a system of First Amendment access rises to the level of a "significant" interest, and provides an added justification for an eminently reasonable and sensible regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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